Saravanan a/l Rajagopal & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS A-05(M)-274–07 OF 2017 AND A-05(M)-276–07 OF 2017
AHMADI ASNAWI, ABDUL RAHMAN SEBLI AND KAMARDIN HASHIM JJCA
10 JANUARY 2019

Criminal Law — Appeal — Appeal against conviction and sentence — Appellants convicted for offence of murder under s 302 of the Penal Code ('the PC') read with s 34 of the PC and sentenced to death — Whether learned judicial commissioner ('JC') erred in disallowing application by counsel to recall witnesses under s 425 of the Criminal Procedure Code — Whether JC erred in finding that bag contained 'parang' used to slash deceased — Whether prosecution's witness was interested witness — Whether there was evidence to prove common intention under s 34 of the Penal Code — Criminal Procedure Code s 425 — Penal Code ss 34 & 302

Evidence — Witness — Interested witness — Whether prosecution's witness interested witness

Saravanan a/l Rajagopal ('the first appellant') and Ganesan a/l Kupusamy ('the second appellant') were charged with the murder of Gobinathan a/l Kumaravellu ('the deceased'), under s 302 of the Penal Code ('the PC') read with s 34 of the same. The prosecution relied on the evidence of SP1 and SP2 whereby both of the witnesses testified that it was the first appellant who had slashed the deceased and that the second appellant watched the incident, seated on SP1's motorcycle. The first appellant denied the allegation and stated that it was the second appellant and SP1 who had slashed the deceased. The second appellant had denied the first appellant's allegation that he had slashed the deceased. At the end of the trial, the learned judicial commissioner ('the JC') found that the defence of both the appellants had failed to raise reasonable doubt to the prosecution's case and accordingly both the appellants were convicted and sentenced to suffer death penalty. In the present appeal, the first appellant raised the following grounds of appeal: (a) the learned JC erred in declining to allow the application by the first appellant's counsel to recall SP1 and SP2 under s 425 of the Criminal Procedure Code ('the CPC') and upon such refusal further declined learned counsel's application to discharge himself from representing the first appellant; (b) the learned JC erred when she found that the badminton bag which was brought to the restaurant when both the appellants returned to the restaurant on SP1's motorcycle, contained the 'parang' that was used to slash the deceased when in fact no evidence was

A adduced to indicate what was inside the said bag; and (c) SP1 was an interested witness and therefore unworthy of credit. As for the second appellant, the learned counsel premised the appeal principally upon the want of evidence that the first appellant had slashed the deceased in furtherance of the common intention between him and the second appellant under s 34 of the PC to
B murder the deceased.

Held, dismissing the first appellant's appeal and allowing the second appellant's appeal:

C (1) The evidence showed that the first appellant's counsel did not proffer any grounds upon the need to call SP1 and SP2, nor indicate the essentiality of the additional evidence of SP1 and SP2 upon recall to the just decision of the case. On account of the non-availability of any grounds or basis for the learned JC to exercise her discretion in favour of the first appellant,
D and in the absence of any indication of the essentiality to recall and re-examine both SP1 and SP2 to the just decision of the case, the court was of the view that the learned JC had not committed any error of law when she refused the application of the first appellant's counsel to recall and re-examine both SP1 and SP2 (see paras 62 & 67).

E (2) The learned JC's refusal to allow the application by the first appellant's counsel to recall and re-examine both SP1 and SP2 was no ground for the learned counsel to discharge himself of his duties upon his appointment by the court to act as counsel for the first appellant, facing a capital offence. Her Ladyship had aptly applied the terms of the circular
F regulating the appointment and conduct of counsel appointed by the court in a criminal trial involving a capital offence. Therefore, the learned JC did not commit error of law when she refused to entertain the learned counsel's application to discharge himself from representing the first appellant (see paras 68–69).

G (3) The court agreed that no evidence adduced that the said badminton bag brought by both the appellants to the said restaurant contained the 'parang' that was used to slash the deceased. Hence, the court agreed with the appellants that the finding by the learned JC that the 'parang' used to
H slash the deceased was brought by both the appellants to the restaurant was erroneous as it was not supported by the evidence adduced. Therefore, the said finding could not be sustained (see paras 75).

(4) Notwithstanding the above finding, it did not detract the fact that the deceased was slashed to death by the first appellant using a 'parang'. The
I first appellant was seen slashing the deceased with a 'parang' by both SP1 and SP2. The learned JC found that the evidence of SP1 and SP2 were not shaken or broken in anyway during the cross-examination. Further, the evidence by SP1 and SP2 were supported by the medical evidence. There was no reason to reject their evidence or to treat their evidence with

suspicion. On the facts, the failure to adduce evidence regarding the contents of the said badminton bag had not created any material gap upon the prosecution's case. Hence, the erroneous finding by the learned JC appeared to be of no consequence in so far as the conviction against the first appellant was concerned (see paras 76, 78–79, 82–83 & 92).

(5) In all the circumstances of the case, the court found that SP1 was not an interested witness. He was a mere bystander who witnessed the commission of the offence (slashing of the deceased) perpetrated by the first appellant, and who happened to be in the company of both the appellants and SP2 before the offence was committed (see para 85).

(6) As alluded earlier, the finding of the learned JC that the 'parang' used to slash the deceased was in the badminton bag was not supported by the evidence adduced and hence could not be sustained. In such event, there was no longer any link between the said 'parang' used by the first appellant in the commission of the offence with the act or conduct of the second appellant anymore to indicate the second appellant's participation in the crime. There was equally no evidence that the second appellant had assisted the first appellant to flee the scene. As such, there was no evidence to suggest that the second appellant had acted in concert with the first appellant in furtherance of their common intention to murder the deceased by assisting the first appellant to flee the scene (see paras 96–97).

[Bahasa Malaysia summary

Saravanan a/l Rajagopal ('perayu pertama') dan Ganesan a/l Kupusamy ('perayu kedua') didakwa dengan pembunuhan Gobinathan a/l Kumaravellu ('si mati'), di bawah s 302 Kanun Keseksaan ('KK') dibaca dengan s 34 yang sama. Pihak pendakwaan bergantung kepada keterangan SP1 dan SP2 di mana kedua-dua saksi memberi keterangan bahawa ia adalah perayu pertama yang telah menetak si mati dan perayu kedua menyaksikan insiden itu, duduk di atas motosikal SP1. Perayu pertama menafikan tuduhan tersebut dan menyatakan bahawa ia adalah perayu kedua dan SP1 yang telah menetak si mati. Perayu kedua menafikan tuduhan perayu pertama bahawa dia telah menetak si mati. Pada akhir perbicaraan, pesuruhjaya kehakiman yang bijaksana ('PK') mendapati bahawa pembelaan kedua-dua perayu gagal menimbulkan keraguan munasabah terhadap kes pendakwaan dan dengan itu kedua-dua perayu telah disabitkan dan dijatuhi hukuman mati. Dalam rayuan ini, perayu pertama membangkitkan alasan rayuan berikut: (a) PK yang bijaksana terkhilaf dalam menolak untuk membenarkan permohonan oleh peguam perayu pertama untuk menarik balik SP1 dan SP2 di bawah s 425 Kanun Tatacara Jenayah ('KTJ') dan penolakan itu terus menolak permohonan peguam yang bijaksana untuk melepaskan diri daripada mewakili perayu pertama; (b) PK yang bijaksana terkhilaf apabila beliau mendapati bahawa beg badminton yang dibawa ke restoran apabila kedua-dua perayu kembali ke

restoran dengan motosikal SP1, mengandungi parang yang digunakan untuk menetak si mati apabila sebenarnya tiada bukti yang dikemukakan untuk menunjukkan apa yang ada di dalam beg itu; dan (c) SP1 adalah saksi berkepentingan dan tidak kredibel. Bagi perayu kedua, peguam yang bijaksana mengasaskan rayuan itu terutamanya atas ketiadaan bukti bahawa perayu pertama telah menetak si mati dengan lanjutan niat bersama antara beliau dan perayu kedua di bawah s 34 KK untuk membunuh si mati.

Diputuskan, menolak rayuan perayu pertama dan membenarkan rayuan perayu kedua:

(1) Keterangan menunjukkan bahawa peguam perayu pertama tidak memberikan sebarang alasan apabila perlu memanggil SP1 dan SP2, atau menunjukkan kepentingan keterangan tambahan SP1 dan SP2 bagi memanggil semula didalam keputusan adil kes. Memandangkan tiada sebarang alasan atau asas bagi PK yang bijaksana untuk menjalankan budi bicaranya memihak kepada perayu yang pertama, dan dengan ketiadaan sebarang petunjuk pentingnya untuk memanggil semula dan memeriksa semula kedua-dua SP1 dan SP2 kepada keputusan adil kes itu, mahkamah berpendapat bahawa PK yang bijaksana tidak melakukan sebarang kesalahan undang-undang apabila beliau menolak permohonan peguam perayu pertama untuk memanggil semula dan memeriksa semula kedua-dua SP1 dan SP2 (lihat perenggan 62 & 67).

(2) Keengganan PK yang bijaksana untuk membenarkan permohonan oleh peguam perayu pertama untuk memanggil semula dan memeriksa semula kedua-dua SP1 dan SP2 tidak menjadi alasan bagi peguam yang bijaksana untuk melepaskan diri dari tugasnya atas pelantikannya oleh mahkamah untuk bertindak sebagai peguam untuk perayu pertama, berhadapan dengan kesalahan hukum bunuh. Yang Arif dengan tepat menggunakan terma Pekeliling yang mengawal selia pelantikan dan kelakuan peguam yang dilantik oleh mahkamah dalam perbicaraan jenayah yang melibatkan kesalahan hukum bunuh. Oleh itu, PK yang bijaksana tidak melakukan kesalahan undang-undang apabila beliau enggan melayan permohonan peguam yang bijaksana untuk melepaskan dirinya daripada mewakili perayu pertama (lihat perenggan 68–69).

(3) Mahkamah bersetuju bahawa tiada keterangan yang menyatakan bahawa beg badminton tersebut yang dibawa oleh kedua-dua perayu ke restoran tersebut mengandungi parang yang digunakan untuk menetak si mati. Oleh itu, mahkamah bersetuju dengan perayu-perayu bahawa penemuan oleh PK yang bijaksana bahawa parang yang digunakan untuk menetak si mati telah dibawa oleh kedua-dua perayu ke restoran itu salah kerana ia tidak disokong oleh keterangan yang dikemukakan. Oleh itu, penemuan tersebut tidak dapat dikekalkan (lihat perenggan 75).

(4) Walau apa pun penemuan di atas, hal itu tidak mengurangi hakikat

bahawa si mati telah ditetak mati oleh perayu pertama menggunakan parang. Perayu pertama dilihat menetak si mati dengan parang oleh kedua-dua SP1 dan SP2. PK yang bijaksana mendapati bahawa keterangan SP1 dan SP2 tidak goyah atau tergugat semasa pemeriksaan balas. Tambahan pula, keterangan oleh SP1 dan SP2 disokong oleh keterangan perubatan. Tiada alasan untuk menolak keterangan mereka atau untuk memperlakukan keterangan mereka dengan syak wasangka. Melalui fakta-fakta, kegagalan untuk mengemukakan keterangan mengenai kandungan beg badminton itu tidak menyebabkan sebarang jurang material atas kes pihak pendakwaan. Justeru, penemuan terkhilaf oleh PK yang bijaksana itu tidak mempunyai kesan setakat mana sabitan terhadap perayu pertama berkenaan (lihat perenggan 76, 78–79, 82–83 & 92).

(5) Dalam semua keadaan kes itu, mahkamah mendapati bahawa SP1 bukan saksi yang berkepentingan. Dia adalah seorang pemerhati yang menyaksikan perlakuan kesalahan itu (penetakan si mati) yang dilakukan oleh perayu pertama, dan yang berada dalam kumpulan kedua-dua perayu dan SP2 sebelum kesalahan itu dilakukan (lihat perenggan 85).

(6) Seperti yang dijelaskan sebelum ini, penemuan PK yang bijaksana bahawa parang yang digunakan untuk menetak si mati adalah dalam beg badminton tidak disokong oleh keterangan yang dikemukakan dan oleh itu tidak dapat dikekalkan. Dalam keadaan demikian, tiada lagi hubungan antara parang yang digunakan oleh perayu pertama dalam melakukan kesalahan itu dengan perbuatan atau perilaku perayu kedua lagi untuk menunjukkan penyertaan perayu kedua dalam jenayah itu. Terdapat juga tiada keterangan bahawa perayu kedua telah membantu perayu pertama untuk melarikan diri dari tempat kejadian. Oleh itu, tiada keterangan yang menunjukkan bahawa perayu kedua telah bertindak bersama perayu pertama untuk meneruskan niat bersama mereka untuk membunuh si mati dengan membantu perayu pertama melarikan diri (lihat perenggan 96–97).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.

For cases on interested witness, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3638–3656.

Cases referred to

Adiswaran a/l Tharumaputrintar v PP and other appeals [2014] 3 MLJ 228; [2014] 3 CLJ 813, FC (refd)

Balasingham v PP [1959] 1 MLJ 193 (refd)

Kumaran a/l Sappani v PP [2012] 6 MLJ 153, FC (refd)

Lim Boon San v PP [1968] 2 MLJ 45 (refd)

Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
PP v Abdul Hamid [1969] 1 MLJ 53 (folld)
PP v Phon Nam [1988] 3 MLJ 415; [1989] 1 CLJ Rep 142, SC (refd)
Rozmi bin Yusof v PP [2013] 5 MLJ 66, CA (refd)

Legislation referred to

Criminal Procedure Code ss 277, 425
Penal Code ss 34, 302

Appeal from: Criminal Trial Nos 45B-2–03 of 2016 and 45B-3–03 of 2016 (High Court, Ipoh)

Hisham Nazir (Hisham Nazir & Co) for the first appellant.
Geetham Ram (Lavanyia Raja and Charan Singh a/l Kartar Singh with her) for the second appellant.
Norinna Bahadun (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmad Asnawi JCA:

[1] The appellants were charged individually on separate dates, with two different case numbers, with the murder of the deceased, one Gobinathan a/l Kumaravellu, under s 302 of the Penal Code ('the PC') read with s 34 of the same. The charge against each of them were identical.

[2] On the application of the learned deputy public prosecutor ('DPP'), the charges against both the appellants were heard together. The charge (as against the first appellant) reads:

> Bahawa kamu, bersama-sama (1) rakan bernama Ganesan a/l Kupusamy No KP 700217-08-5293 pada 5 Julai 2015 jam lebih kurang 12.00 tengah hari hingga 1.00 petang di belakang Restoren Nashmeer, Laluan Klebang Restu 2, Medan Klebang Restu, Chemor, Ipoh, Perak, dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan, telah melakukan pembunuhan dengan menyebabkan kematian ke atas Gobinathan a/l Kumaravellu No KP 710905-08-6221 dan oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun yang sama.

[3] At the conclusion of the trial, both the appellants were convicted of the offence and were consequently sentenced to suffer the death penalty in accordance with s 277 of the Criminal Procedure Code ('the CPC').

[4] The appeals by both appellants were in respect of their convictions and sentences.

[5] We heard their appeals and at the end of the hearing, after due consideration of the issues raised and submissions made by both the parties, we dismissed the first appellant's appeal and correspondingly though allowed the second appellant's appeal. We now offer our grounds.

CASE FOR THE PROSECUTION

[6] The prosecution relied on the evidence of SP1 (Kesavan a/l Gurappan) and SP2 (Anberson a/l Mathiyalagan) to prove its case.

[7] SP1 testified that on the morning of 5 July 2015, he picked up the first appellant from his house using his motorcycle, No AJE 2672, and took him to Nashmeer Restaurant in Klebang Restu, Ipoh (as indicated in the charges). While there, SP1 further obliged the second appellant's request through the mobile phone to pick him up and bring him to the restaurant from a petrol station, located about five minutes away from the said restaurant. All the three of them allegedly were at the restaurant to meet a scrap metal dealer.

[8] Soon after, SP1's friend, SP2, joined them at the table.

[9] The deceased (Gobinathan a/l Kumaravellu) was SP1's former employer.

[10] SP1 next saw the deceased circling the area in a white Proton Waja.

[11] Still later, the deceased was again seen circling the area, now on a motorcycle.

[12] At this juncture the first appellant then borrowed SP1's motorcycle and left the restaurant with the second appellant.

[13] About ten minutes later both the appellants came back to the restaurant. SP1 now noticed a badminton bag in the carrier of his motorcycle.

[14] Meanwhile the deceased was seen entering a hardware shop, a few shops away from the restaurant.

[15] Both the appellants then left the restaurant, again using SP1's motorcycle and proceeded towards the direction of the hardware shop.

[16] Shortly thereafter, SP1 saw the deceased runnmg into the restaurant shouting for help, being pursued by the first appellant wielding a *parang* with a long blade. The deceased exited the restaurant through the back door into the back lane. SP1 also saw the second appellant riding his motorcycle and went

past the restaurant towards the back lane.

[17] SP1 further testified that he, SP2 and others who were in the restaurant rushed to the back lane to see what was happening. He saw the first appellant strike two blows on the deceased hand with the *parang*, whilst the second appellant sat on the motorcycle and watched the attack. SP1 added that he and SP2 panicked and left the restaurant within five minutes of the incident and proceeded to SP2's house at Sungai Siput.

[18] SP1 admitted in cross-examination that three weeks before the deceased's murder, the first and second appellant had visited SP1 at Indah Water Seri Klebang where SP1 had worked there as a security guard for the deceased. This had angered the deceased who then parked his car in front of the second appellant's lorry to prevent him from entering the place. Both the appellants and few others reacted by smashing the deceased's car windscreen. The deceased escaped by running out of his car.

[19] The deceased blamed SP1 for the incident and terminated his employment a few days later.

[20] The testimony of SP2 was on all fours with the testimony of SP1. He corroborated SP1's evidence that it was the first appellant who had slashed the deceased and that the second appellant watched the incident, seated on SP1's motorcycle. It was not put to SP2 though that it was he and SP1 who had jointly slashed the deceased as put to SP1. Instead, it was put to SP2 that only SP1 had slain the deceased.

[21] The thrust of the first appellant's defence as put to SP1 was that the first appellant was not involved in the murder of the deceased and that the deceased was slashed by both SP1 and SP2. It was also put to SP1 that he was at the restaurant on that day to meet the deceased whom he (SP1) had earlier messaged to meet him there and that his (SP1) intention was to exact revenge as the deceased had fired him from his job as a security guard. Nevertheless, SP1 denied all the allegations put to him.

[22] At the end of the prosecution's case, the learned judicial commissioner ('JC') found no issue with the identity of the deceased. She also found that the evidence of the pathologist (SP3, Dr Siti Zanariah bt Md Naziri) regarding the nature of the injuries found on the person of the deceased particularly those on his head, showed that the deceased was slashed with the intention of causing his death.

[23] The learned JC also found that the evidence of SP1 and SP2 was not shaken or broken in any way and going by their evidence it was established that

it was the first appellant who had slashed the deceased to death.

[24] The learned JC also found that there was sufficient evidence that the first appellant had slashed the deceased to death in furtherance of the common intention between him and the second appellant to kill the deceased.

[25] Finally, the learned JC ruled that on a maximum evaluation of the evidence as adduced, the prosecution had established a prima facie case against both the appellants, which if left unrebutted, would warrant their convictions.

THE DEFENCE OF THE FIRST APPELLANT

[26] The first appellant gave evidence on oath.

[27] The first appellant said that at the material time he was working for the second appellant, who was in the business of buying and selling scrap metal.

[28] He agreed that SP1 had picked him up that morning from his house and took him to Nashmeer Restaurant and thereafter SP1 picked up the second appellant.

[29] The first appellant said that he and the second appellant had come to Klebang Restu to meet a scrap metal supplier. Whilst they were having a meal at the restaurant, he saw the deceased circling around the restaurant on his motorcycle.

[30] He then heard the second appellant ask SP1 if he had a *parang*. SP1 replied he did. SP1 then telephoned SP2 to bring a knife to the restaurant.

[31] When SP2 came to the restaurant, SP1 asked him if he had brought a knife, to which SP2 replied affirmatively.

[32] Then he heard them plotting to kill the deceased. He panicked and excused himself by going to the toilet. When he came out, he heard the deceased shouting for help and running to the back of the restaurant which opened to the back lane.

[33] The first appellant said he went to the back lane and saw the second appellant and SP1 slashing the deceased. He was shocked and asked SP2 to send him home.

[34] That same night, the second appellant came to his house and warned him that if he reported the matter, he would suffer the same fate as the

deceased. It was for this reason that he had not put his version to SP1 and SP2 during cross-examination.

[35] The other reason for not doing so was because of one Moses, a fellow inmate in Taiping prison, who had assaulted him at the behest of the second appellant and warned him not to implicate the second appellant during the trial. One Sjn Mazlan from Taiping prison was aware of the same and would be able to confirm it.

[36] The pt appellant further alleged that he has been falsely implicated by the investigating officer (SP7, ASP Nirmala a/p Arumugam) because of an incident involving her husband and himself. SP7's husband had on one occasion came over to his house and shouted abuses at his father over a pawn ticket. PW7's husband left his house when he approached him to beat him.

[37] The first appellant agreed with the narrative of the incident involving the smashing of the deceased's car windscreen as alluded by SP1. However, he said that it was the second appellant and SP1 who had shattered the said windscreen. He himself never did.

[38] The first appellant's father, SD2 (Rajagopal a/l Munisamy) testified that he and SP7's husband had a misunderstanding over some pawn ticket a few years ago and SP7 had falsely implicated his son with the murder of the deceased.

[39] Meanwhile, SD3 (Moses a/l Paramasivam) admitted that he had assaulted the first appellant at Taiping prison because the first appellant had uttered vulgarities at him. The assault has nothing to do with this case or that he was doing it upon the behest of the second appellant.

[40] Sergeant Mazlan bin Zakaria was subpoenaed but was not called to testify.

THE DEFENCE OF THE SECOND APPELLANT

[41] The second appellant testified that he was a scrap metal dealer.

[42] He denied that he had slashed the deceased as alleged by the first appellant.

[43] He agreed that he was at the said restaurant with the first appellant, SP1 and SP2 after being picked up and brought to the restaurant by SP1 from the Mobil petrol station where he had earlier parked his lorry.

[44] He said he came to the restaurant to meet a scrap metal dealer that SP1 had arranged for him to meet. However, the scrap metal dealer did not show up.

[45] About half an hour later, he received a call from his customer, an Indonesian called Man. At about the same time he saw the deceased riding a motorcycle in front of the restaurant.

[46] Then he left the restaurant together with the first appellant on SP1's motorcycle to meet his customer at a shop nearby. He bought copper wires from his customer and put it in a bag.

[47] Then he realised that he had left his pouch containing his wallet at the restaurant. He went back to the restaurant to retrieve the pouch with the first appellant.

[48] On the way back to make payment to his customer, the first appellant asked to be dropped off near the Maybank premises in the vicinity.

[49] The second appellant further testified that after paying his customer, he went back to his lorry and left the bag containing copper wires therein. He came back about ten minutes later but did not see the first appellant near the Maybank premises or at the restaurant.

[50] Instead he heard a commotion coming from behind the restaurant. He went to the back lane on SP1's motorcycle and saw several people including SP1, SP2 and the first appellant there.

[51] He called out to the first appellant, who then came to him. He proceeded to the Mobil petrol station where his lorry was parked together with the first appellant. He took his lorry and went home and asked the first appellant to return the motorcycle to SP1.

[52] The second appellant admitted that three weeks prior to the deceased's murder, he had smashed the wind screen of the deceased's car. He also testified that in the same incident, the first appellant had used a knife to damage the same. He further denied that he had requested Mosses to assault and threaten the first appellant.

[53] Put shortly, at the end of the hearing, the learned JC found that the defence of both the appellants had failed to raise a reasonable doubt upon the prosecution's case and correspondingly found that the prosecution had proven its case beyond a reasonable doubt against both the appellants.

[54] Hence, both the appellants were found guilty of committing the offence and were convicted of the same thereof and consequently both were sentenced to suffer the death penalty.

THE FIRST APPELLANT'S APPEAL

[55] The first appellant raised the following grounds:

(a) the learned JC erred in declining to allow learned counsel's application to recall SP1 and SP2 under s 425 of the CPC; and upon such refusal further declined learned counsel's application to discharge himself from representing the first appellant;

(b) the learned JC erred when she found that the badminton bag which was brought to the restaurant when both the appellants returned to the restaurant on SP1's motorcycle, contained the *parang* that was used to slash the deceased when in fact no evidence was adduced to indicate what was inside the said bag; and

(c) SP1 was an interested witness and therefore unworthy of credit.

OUR DECISION

First ground — The learned JC's refusal to allow the recalling of witnesses under s 425 of the CPC

[56] Learned counsel for the first appellant submitted that one Ranjit Singh was earlier the counsel representing the first appellant until the conclusion of the testimonies of SP1 and SP2. The said Ranjit Singh then had applied to discharge himself for no apparent purpose and was allowed by the learned JC. Thereafter, Mr M Saravanan was appointed by the court to act for the first appellant. Mr M Saravanan then applied to recall SP1 and SP2 under s 425 of the CPC, but was refused by the learned JC. Upon this refusal, the said Mr M Saravanan then applied to discharge himself. This application was also refused by the learned JC. Mr M Saravanan went on to represent the first appellant until the conclusion of the trial. Learned counsel thus submitted that this had occasioned a great prejudice to no end to the first appellant.

[57] The event was captured in the notes of evidence at pp 102–103, *Jld* 2, *rekod rayuan* ('RR'). It shows, reproduced in extenso:

> 7 September 2016, 10.00 pagi
>
> Harris Ong, Timbalan Pendakwa Raya (TPR) bagi pihak pendakwaan.
>
> M Saravanan untuk OKT-1
>
> Charan Singh untuk OKT-2
>
> Tertuduh-tertuduh hadir.

Perbicaraan bersambung.

Peguam OKT-1:

Memohon untuk memanggil balik SP1 dan SP2 bagi pemeriksaan semula.

Mahkamah:

Apa soalan?

Peguam:

Saya tidak boleh beritahu mahkamah kerana nanti tiada elemen surprise.

Mahkamah:

Permohonan ditolak.

Peguam:

Memandangkan permohonan saya telah ditolak, saya mohon untuk discharge myself.

Mahkamah:

Circular: Apabila seseorang peguam bela dan peguam cara telah menerima lantikan mahkamah, peguam bela dan peguam cara tersebut tidak boleh menarik diri dengan sewenang-wenangnya dari perlantikan tersebut. Sebarang permohonan untuk penarikan diri hendaklah dibuat di mahkamah terbuka.

Mahkamah:

Application is not allowed.

[58] It is apparent from the transcript that Mr M Saravanan had refused to disclose the purported questions to be ask to warrant the recalling of SP1 and SP2 even though he was probed by the learned JC. Mr M Saravanan also did not advance any reason why he would want to recall SP1 and SP2.

[59] Section 425 of the CPC provides as follows:

> Any court may at any stage of any enquiry, trial or other proceeding under this code summon any person as witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

[60] Learned counsel frankly agreed that the powers conferred to the court under s 425 of the CPC, in particular, to recall and re-examine a witness already examined is discretionary in nature. As such there must be some basis for the court to exercise its discretion, the main consideration being the essentiality of the additional evidence of the recalled witness to the just decision of the case. This must be so as the underlying jurisprudence of calling or summoning any person as a witness or the recalling and re-examining of any witness already examined under s 425 of the CPC, must necessarily be anchored upon whether his evidence or additional evidence upon recall appears to be essential to the

just decision of the case. Anything less will not be sufficient to meet the requirement under the said section.

[61] Hence, the section calls for grounds or reasons for the proper exercise of the said discretion to indicate that the recall and re-examination of the witness already examined appears to be essential to the just decision of the case.

[62] Now, the evidence showed that Mr M Saravanan did not proffer any grounds upon the need to recall SP1 and SP2, nor indicate the essentiality of the additional evidence of SP1 and SP2 upon recall to the just decision of the case.

[63] Mr M Saravanan, when asked by the court, even declined to reveal the purported questions he intended to ask SP1 and SP2 upon grounds of secrecy. He wanted to spring a surprise or two upon all the parties including the court by keeping the questions up his sleeve. He told the court '... saya tidak boleh beritahu Mahkamah nanti tiada elemen surprise ...'. In our view, this is an outmoded strategy, totally out of sync with the law and practise.

[64] It is our judgment that in such event, the learned JC did not err when she refused Mr M Saravanan's application to recall SP1 and SP2. Clearly, on the facts, she was devoid of any basis to exercise her discretion in favour of the first appellant We have equally examined the notes of evidence pertaining to the testimonies given by SP1 and SP2 and found that the examination of both the said witnesses were sufficiently comprehensive and competently executed by both the prosecution and the defence. Both SP1 and SP2 were also thoroughly cross-examined by the defence to the hilt, leaving no stones unturned. The correct questions were in place and both the appellants had in fact laid down their defence bare through the cross-examination of SP1 and SP2. The prosecution had also satisfactorily re-examined both SP1 and SP2 arising out of the cross-examination of both the witnesses. Hence, it is incumbent upon the learned counsel (Mr M Saravanan) to indicate the essentiality of the need to recall and re-examine both SP1 and SP2 to the just decision of the case. Verily, Mr M Saravanan had failed to get the job done.

[65] We found support in the following passage in *Public Prosecutor v Abdul Hamid* [1969] 1 MLJ 53 at p 54, as indicated to us by the learned DPP:

> No doubt s 425 of the Criminal Procedure Code gives a wide discretion to the court to summon and examine any person to give evidence but this power, as has been reiterated by many authorities which I need not cite here, must he exercised with the outmost caution and only where as set out in the provisions, the evidence of that person appears to the court essential to the just decision of the case.

[66] Meanwhile, the Supreme Court in *Public Prosecutor v Phon Nam*

[1988] 3 MLJ 415 at p 461; [1989] 1 CLJ Rep 142 at p 145, states the following as the governing provision:

> Section 425 of the Criminal Procedure Code is clearly divided into two limbs; first, a discretionary provision which provides that the court may, on an application, summon any person as a witness or recall and re-examine any person already examined at any stage of any inquiry, trial or other proceeding under the Code. In exercising the discretion under the first limb, the court clearly must proceed with utmost circumspection especially when there was likelihood of the fresh evidence proving to be prejudicial to the accused. Secondly, an imperative provision which requires the court to do so where the court is satisfied that the evidence to be summoned would appear to the court to be essential to a just decision of the case (see *Mohd Azam v Mohd Iqbal* PLD 1984 Supreme Court 95 with the corresponding section in the Pakistan Criminal Procedure Code).

[67] On account of the non-availability of any grounds or basis for the learned JC to exercise her discretion in favour of the first appellant, and in the absence of any indication of the essentiality to recall and re-examine both SP1 and SP2 to the just decision of the case, we opined that the learned JC had not committed any error of law when she refused Mr M Saravanan's application to recall and re-examine both SP1 and SP2.

[68] We also opined that the learned JC did not commit any error of law when she refused to entertain Mr M Saravanan's application to discharge himself from representing the first appellant pursuant thereto.

[69] Her Ladyship's refusal to allow Mr M Saravanan's application to recall and re-examine both SP1 and SP2 is no ground for Mr M Saravanan to discharge himself of his duties upon his appointment by the court to act as counsel for the first appellant, facing a capital offence. Her Ladyship had aptly applied the terms of the circular regulating the appointment and conduct of counsel appointed by court in a criminal trial involving a capital offence.

Second ground — Wrong finding by the learned JC that the badminton bag contained the parang used to slash the deceased

[70] Learned counsel for the first appellant adopted the submission of learned counsel for the second appellant pertaining to the issue of what was inside the badminton bag.

[71] In respect of the same, the learned JC, after alluding to the rules governing the application of s 34 of the Penal Code ('the PC') as postulated in *Adiswaran a/l Tharumaputrintar v Public Prosecutor and other appeals* [2014] 3 MLJ 228; [2014] 3 CLJ 813, found, as indicated in her ground of judgment (at p 23, *Jld* 1, *RR*) the following:

A Applying the principles here, the evidence of Kesavan and Anberson showed that though the first accused was the actual doer of the criminal act in the present case, the second accused was also present and participated by assisting him in two ways. First, there was unchallenged evidence that prior to the murder, the first and second accused had left the restaurant for a short while and when they returned, they had
B a badminton bag with them. It was true that there was no direct evidence as to what was in the said bag, but the fact the murder took place soon after they had returned, indicated it must have been the parang that was used to slash the deceased.

C **[72]** In assessing the evidence of the second appellant, the learned JC had again alluded that the *parang* used to slash the deceased was brought to the restaurant in the badminton bag by both the appellants. Thus, at para 54, of her grounds of judgment (at p 32, *Jld* 1, *RR*) she found:

D ... As in the case of the first accused, having accepted, as I did, the testimony of Kesavan and Anberson, which affords proof that the second accused was at the back lane when the deceased was slashed, and the parang used to slash the deceased was brought to the restaurant in a badminton bag by the first and second accused. His defence must also fail.

E **[73]** The said findings by the learned JC, nevertheless, came under heavy criticism by learned counsels. They contended that the finding that the *parang* used to slash the deceased was brought to the restaurant by both the appellants in a badminton bag was not supported by the evidence adduced. No witness testified that the badminton bag contained the *parang*. There was also no
F evidence that the said *parang* was ever inside the badminton bag. Both SP1 and SP2 also did not say that the *parang* was concealed inside the badminton bag that was taken to the restaurant by both the appellants. It was further contended that even if the learned JC had inferred that the *parang* was inside the badminton bag brought by both appellants, the inference was made
G without basis with no supporting evidence and therefore has no leg to stand on.

[74] It was also contended that the learned JC's reliance upon the deceased's son testimony (SP6, Sathivel a/l Gobinathan) that during the incident at Indah Water Seri Klebang, the first appellant was armed with a *parang* demonstrated
H that the appellants kept a *parang* in their lorry and had left the restaurant to bring it to attack the deceased, cannot be a safe inference in the absence of evidence that the badminton bag they brought to the restaurant contained the said *parang*.

I **[75]** We were in agreement that no evidence was adduced that the said badminton bag brought by both the appellants to the said restaurant contained the *parang* that was used to slash the deceased. We also agreed that the evidence is insufficient to safely make an inference that the said badminton bag contained the *parang* used to slash the deceased. Hence, we were in agreement

with counsels' submission that the finding by the learned JC that the *parang* used to slash the deceased was brought by both the appellants to the restaurant was erroneous as it was not supported by the evidence adduced. Therefore, the said finding cannot be sustained.

[76] However, notwithstanding that the finding by the learned JC that the *parang* used to slash the deceased was inside the badminton bag was erroneous and cannot be sustained, it does not detract the fact that the deceased was slashed to death by the first appellant using a *parang*. He was seen slashing the deceased with a *parang* by both SP1 and SP2. In fact the SP1 saw the deceased running into the restaurant shouting 'tolong! tolong!' and was pursued by the first appellant wielding a *parang*. SP1 saw the deceased exited the restaurant through the back door into the back lane. At the back lane SP1 saw the first appellant strike two blows on the deceased's hand with the *parang*, whilst the second appellant sat on the motorcycle and watched the attack. Earlier SP1 had seen the second appellant riding his (SP1's) motorcycle and went past the restaurant towards the back lane.

[77] SP2 corroborated SP1's evidence in material particulars.

[78] There is no reason to treat the testimonies of SP1 and SP2 with suspect. Equally there is no reason to reject their testimonies. The learned JC who had seen and heard the two witnesses testifying before her, found no merit in the contention of the first appellant that SP1 and SP2 were unreliable witnesses whose evidence ought to be rejected. Equally, she found no merit in the contention that they had a motive to falsely implicate the first appellant to exonerate themselves. The learned JC also found that the evidence of SP1 and SP2 was not shaken or broken in anyway during their cross-examination. These were the factual findings of the learned trial judge on the credit worthiness of the witnesses (SP1 and SP2) testifying before her. It is absolutely within her domain and we have no business to find otherwise unless it is shown that such findings is plainly perversed, unsustainable and not supported by the evidence adduced.

[79] In addition, the evidence of SP1 and SP2 that the first appellant had slashed the deceased using a *parang* was amply supported by the medical evidence.

[80] The pathologist (SP3) performed the autopsy on the deceased. She found 19 injuries on the deceased's person consisting of four deep slash or chop wounds and the rest were superficial incisive wounds. The four chop wounds were on the deceased's head, two of which were deep and penetrating. The defensive injuries to both the deceased arms were deep and had severed his

arteries and fractured the bones in both his hands. SP3 opined that the deceased had died from excessive bleeding from these slash wounds which could have been caused by a sharp object, the like of a *parang*.

[81] From the narrative of the investigation conducted by SP3, clearly there can be no doubt that a *parang* was used to slash the deceased to his death.

[82] On the facts we opined that the failure to adduce evidence regarding the contents of the said badminton bag, in particular whether the *parang* that was used to slash the deceased was inside the said bag, has not created any material gap upon the prosecution's case.

[83] Hence, we found that the erroneous finding by the learned JC that the *parang* that was used to slash the deceased was brought to the restaurant in a badminton bag by the first and second appellant appeared to be of no consequence in so far as the conviction against the first appellant is concerned.

Third ground — SP1 was an interested witness

[84] Learned counsel for the first appellant submitted that SP1 is an interested witness. He had all the motive to end the deceased's life in revenge of the deceased's temerity in blaming him (SP1) for the incident involving the shattering of the windscreen of the car belonging to the deceased which occurred about three weeks earlier and the consequential termination of his employment as security guard with the deceased company. All the more so when the deceased disappeared from the scene and fled his home immediately after the murder incident to Rawang and was arrested only weeks later. It was squarely put to SP1 that he had slashed the deceased to death.

[85] In all the circumstances of the case, in our judgment, SP1 is not an interested witness. He was a mere bystander who witnessed the commission of the offence (slashing of the deceased) perpetrated by the first appellant, and who happened to be in the company of both the appellants and SP2 before the offence was committed.

[86] It is true that it was put to SP1 by the first appellant's learned counsel that he and the SP2 were the real culprits who had slashed the deceased. However, the allegation was denied by SP1. In our view, the denial is no mere rhetoric. It does carry a ring of truth as there is no evidence to connect him with the slashing of the deceased to death. Even the second appellant did not say that it was SP1 who had slashed the deceased.

[87] It is also true that SP1 had agreed that three weeks before the murder of the deceased, there had been an incident involving the smashing of the

windscreen of the deceased's car by both the appellants and others aligned to the appellants. SP6 (the deceased's son) had corroborated SP1's evidence that he did not participate in the smashing of the windscreen of the deceased's car. However, the deceased squarely blamed SP1 for the incident, resulting in the termination of his employment with the deceased. Nevertheless, SP1 testified that he was not perturbed by the said accusation and termination of his employment. He had no ill feeling towards the deceased.

[88] We shared our empathy with him. The blame game and the termination of his employment thereafter appeared too trivial and remote a matter to propel him to undertake such a horrifying revenge against the deceased.

[89] Even if SP1 is an interested witness, he is still entitled to credence until cogent reason for disbelief can be advanced and admitted to prove otherwise. There is no legal presumption that an interested witness should not be believed — see *Balasingham v Public Prosecutor* [1959] 1 MLJ 193. Though the authorities also suggested that the evidence of an interested witness must be treated with caution, there is no rule of law requiring the trial judge to caution himself and make a specific ruling on the credibility of such witness — see *Rozmi bin Yusof v Public Prosecutor* [2013] 5 MLJ 66; *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805; *Lim Boon San v Public Prosecutor* [1968] 2 MLJ 45; *Kumaran a/l Sappani v Public Prosecutor* [2012] 6 MLJ 153.

[90] Thus, the evidence of an interested witness will be assessed and weighed in the like manner as that of any other witness and will similarly be subjected to the vagaries of cross-examination. It is then the ensuing business of the trial judge to make a ruling at the end of the trial on the veracity of such witness and decide whether to reject or admit his evidence in whole or in part.

[91] The learned JC, having seen and heard SP1 and SP2 giving evidence, ruled at the end of the trial (at p 30, *Jld* 1, *RR*) that:

> I was completely satisfied that the testimony of Kesavan and Anberson was that of witnesses of truth. Having seen them give their evidence, and having observed their demeanour, especially under cross-examination and having tested it against the totality of the evidence, I was satisfied that they were telling the truth about what they had witnessed. They had no reason to falsely implicate the first and second accused.

[92] Again, sitting in an appellate capacity, we were in no position to disagree or dispute the learned JC's assessment of the credit worthiness of both SP1 and SP2. As such there is no reason to reject their evidence or to treat their evidence with suspicion.

A CONCLUSION

[93] For all the reasons given, we dismissed the first appellant's appeal and affirmed the conviction and sentence handed down upon him by the High Court.

B

THE SECOND APPELLANT'S APPEAL

[94] Learned counsel for the second appellant premised his client's appeal principally upon the want of evidence that the first appellant had slashed the deceased in furtherance of the common intention between him and the second appellant under s 34 of the Penal Code ('the PC') to murder the deceased.

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[95] At the end of the prosecution's case, the learned JC, after applying the principles of the law on common intention as alluded by the Federal Court in *Adiswaran Tharumaputrintar v Public Prosecutor & Other Appeals* stated that the evidence of SP1 and SP2 showed that although the first appellant was the actual doer of the criminal act, the second appellant was also present and participated by assisting him in two ways:

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(a) there was the unchallenged evidence that prior to the murder, both appellants had left the restaurant for a short while and when they returned, there had a badminton bag with them. Although there was no direct evidence as to what was in the said bag, but the fact that the murder took place soon after they had returned, indicated it must have been the *parang* that was used to slash the deceased; and

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(b) the second appellant also assisted the first appellant to flee the crime scene on SP1's motorcycle. The *parang* that was used in the commission of the offence was not found at the crime scene. This indicated that it was taken away by the first appellant.

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[96] We have intimated earlier that the finding of the learned JC that the *parang* used to slash the deceased was in the badminton bag was not supported by the evidence adduced and hence, cannot be sustained. In such event there is no longer any link between the said *parang* used by the first appellant in the commission of the offence with the act or conduct of the second appellant anymore to indicate the second appellant's participation in the crime.

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[97] There is equally no evidence that the second appellant had assisted the first appellant to flee the scene. No witness had testified that the second appellant had assisted the first appellant to flee the scene. Even the learned DPP agreed that there is no evidence as to how the first appellant had fled the scene of crime. As such, there is again no evidence to suggest that the second appellant had acted in concert with the first appellant in furtherance of their

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common intention to murder the deceased by assisting the first appellant to flee the scene.

[98] On these grounds alone, we had allowed the second appellant's appeal. Thus his conviction and sentence as handed down by the learned JC is set aside and substituted with an order of acquittal and discharged.

First appellant's appeal dismissed; second appellant's appeal allowed.

Reported by Dzulqarnain Ab Fatar